

DOCKET NO. 581055

IN RE ALLEN-BURCH, INC.
D/B/A THE FARE
PERMIT NOS. MB234661, LB234662

DALLAS COUNTY, TEXAS
(SOAH DOCKET NO. 458-00-1535)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 3rd day of August 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on October 16-18, 2000, and the record closed on January 5, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 4, 2001. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Respondent filed exceptions on July 23, 2001.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

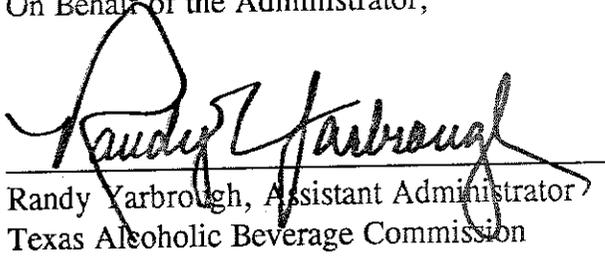
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB234661 and LB234662 are herein **CANCELED FOR CAUSE**.

This Order will become final and enforceable on August 24, 2001, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 3rd day of August, 2001.

On Behalf of the Administrator,


Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (214) 956-8611

Holly Wise, Docket Clerk
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Dewey A. Brackin
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TABC Legal Section

Licensing Division
Dallas District Office

DOCKET NO. 458-00-1535

TEXAS ALCOHOLIC BEVERAGE COMMISSION

Petitioner

VS.

ALLEN-BURCH, INC., D/B/A THE FARE PERMIT NOS. MB-234661 & LB-234662 DALLAS COUNTY, TEXAS (TABC CASE NO. 581055)

Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission Staff (Staff) brought this action against Allen-Burch Inc., d/b/a The Fare (Respondent) alleging that Respondent or its employees, agents, or servants, engaged in or permitted conduct on Respondent's premises that was lewd, immoral, or offensive to public decency; that Respondent failed to notify Petitioner of breaches of the peace on Respondent's premises; and that Respondent or its employees, agents, or servants, engaged in soliciting a customer to buy drinks for consumption by an employee of Respondent. The Administrative Law Judge (ALJ) finds that Staff has proven the allegations and recommends that Respondent's permits be canceled.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of notice, jurisdiction, or venue in this proceeding. Therefore, those matters are set out in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter was convened on October 16-18, 2000, before ALJ Jerry Van Hamme, at the offices of the State Office of Administrative Hearings (SOAH), 6333 Forest Park Road, Ste. 150-A, Dallas, Dallas County, Texas. Staff was represented by Dewey Brackin and Timothy Griffith, attorneys for the Texas Alcoholic Beverage Commission (Commission). Respondent was represented by Charles Quaid and Eugene Palmer, attorneys. The record remained open for receipt of the parties proposed findings of fact and conclusions of law. The record was closed on January 5, 2001.

II. BACKGROUND

Respondent is a sexually oriented business. It employs female dancers, who wear bikini bottoms and opaque coverings over the areola of their breasts, to dance on stage and perform table

dances for individual patrons.

Between July 16, 1998, and April 8, 2000, Dallas Police Department (DPD) officers were present at Respondent's location, either conducting on-site undercover inspections or as a result of being dispatched to Respondent's establishment in response to calls for assistance. During the undercover inspections, DPD officers reported that they observed Respondent's dancers performing lewd table dances, and observed a waitress solicit an undercover officer to purchase a drink for a dancer, all in violation of the Code, as set forth below. DPD officers informed the Commission Staff of these apparent violations.

Staff also determined from DPD officers that calls for assistance were precipitated by breaches of the peace occurring on Respondent's premises, but that Respondent failed to notify the Commission of the breaches. Failing to inform the Commission of breaches of the peace occurring on a permittee's premises constitutes a violation of the Code. The appropriate Code provisions are set forth below.

III. LEGAL STANDARDS

1. Lewd, Immoral, or Offensive Conduct

Lewd dancing on a permittee's premises is prohibited under the following provisions:

TEX ALCO. BEV. CODE ANN. § 104.01(6) (Vernon 2000) states, in pertinent part:

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts:

(6) permitting lewd or vulgar entertainment or acts;

"Lewd or vulgar entertainment or acts," as prohibited above, are defined in 16 TEX. ADMIN. CODE §35.41(1) as follows:

(1) Lewd and vulgar entertainment or acts—Any sexual offenses contained in the Texas Penal Code, Chapter 21, or any public indecency offenses contained in the Texas Penal Code, Chapter 43. (See Texas Alcoholic Beverage Code, §§104.01(6).)

One such "sexual offense contained in the Texas Penal Code, Chapter 21" as referred to above is public lewdness, which is defined in TEX. PEN. CODE ANN. § 21.01(7) (Vernon 2000) as follows:

(a) A person commits an offense if he knowingly engages in any of the following acts in a public place or, if not in a public place, he is reckless about whether another is present who will be offended or alarmed by his:

(3) act of sexual contact

"Sexual contact," as set forth above, is defined in TEX. PEN. CODE ANN. § 21.01(2) (Vernon 2000) as follows:

(2) "Sexual contact" means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.

2. Soliciting Customers to Buy Drinks for Consumption by Respondent's Employee

A permittee which permits an employee to solicit a customer to purchase a drink for the permittee's employee violates TEX ALCO. BEV. CODE ANN. § 104.01(4) (Vernon 2000), which states, in pertinent part:

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts:

(4) solicitation of any person to buy drinks for consumption by the retailer or any of his employees;

3. Failure to Report Breach of Peace

A permittee's failure to report a breach of the peace on its premises constitutes a violation of TEX ALCO. BEV. CODE ANN. § 11.61(b)(21) (Vernon 2000), which states:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

(21) the permittee failed to promptly report to the commission a breach of the peace occurring on the permittee's licensed premises.

IV. PARTIES' EVIDENCE AND CONTENTIONS

1. Staff's Evidence and Contentions

The specific observations of alleged Code violations made by DPD officers on Respondent's premises are as follows:

a. Lewd, Immoral, or Offensive Conduct

i. Testimony of Detective Daniel Town Regarding Events of July 16, 1998

Detective Daniel Town of the Dallas Police Department testified that on July 16, 1998, he was at Respondent's establishment with his partner, Detective Timothy Prokoff. Detective Town purchased a table dance from Brandy Louise Besio, one of Respondent's dancers. During the table dance, Ms. Besio pulled Detective Town's head into her breasts, straddled his leg, and ground her

clothed genitals and buttocks against his clothed genitals several times in a manner simulating sexual intercourse. She also slid her body down between his legs, rubbing the top of her head and her left knee against his clothed genitals. Given her repeated contact with his clothed genitals, Detective Town was of the opinion that the contact was neither accidental nor incidental, and that it was intended to sexually arouse him.

Detective Town was approached by a second dancer, Shudelion Denise Gant, who also performed a table dance for him. Ms. Gant pulled Detective Town's head into her breasts, slid her body down his, and, while on her knees between his legs, rubbed her chest and stomach against his clothed genitals. She also performed rearward and forward thrusting motions of her clothed buttocks and genitals against his clothed genitals, making contact with his clothed genitals. Detective Town was of the opinion that the dancer's intent was to sexually arouse him.

ii. Testimony of Detective Timothy Prokoff Regarding Events of July 16, 1998¹

Detective Timothy Prokoff, DPD, observed the table dances performed by Ms. Besio and Ms. Gant for Detective Town. Detective Prokoff observed that both dancers, during the course of their table dances, made repeated contact with Detective Town's clothed genitals.

Detective Prokoff, also testified that a dancer, Nicole Susan Cheek, seated herself on his lap and offered to perform a table dance. He agreed, whereby Ms. Cheek rubbed her buttocks against his clothed genitals simulating sexual intercourse, and also rubbed her knees and shin against his clothed genitals. Based on the duration, frequency, and manner of contact, Detective Prokoff was of the opinion that the dancer intended to sexually arouse him.

Approximately 15-20 minutes later another dancer, Lynn Elizabeth Howell, sat in Detective Prokoff's lap, straddling him face-to-face, and offered to perform a table dance. He agreed, at which time Ms. Howell rubbed her buttocks, knees, shin, ankle, and vaginal area against his clothed genitals. Because of the duration of the contact with his clothed genitals, Detective Prokoff was of the opinion that the contact was not incidental and that the dancer intended to sexually arouse him.

iii. Testimony of Officer Frank Plaster Regarding Events of August 13, 1998

Officer Frank Plaster, who at the time of this event was a vice detective with the DPD, testified that he and Detective Ronald Catlin entered Respondent's establishment the afternoon of August 13, 1998. While seated at a table, Detective Plaster was approached by a dancer, Dawn M.

¹ Detective Prokoff's testimony at this hearing came from his deposition. Pages 89-100 of his deposition were offered into evidence as Petitioner's Exhibit No. 7. This portion of his deposition testimony does not indicate the date on which these events occurred. However, his testimony shows that he and Detective Town entered Respondent's establishment together and that he observed Ms. Gant and Ms. Besio perform table dances for Detective Town. This sufficiently correlates with Detective Town's testimony to conclude that Detective Prokoff was testifying concerning the events of July 16, 1998.

Schwalen, who performed a table dance for him. During the course of the dance, she ground her clothed genitals against his clothed genitals three or four times, and rubbed her breasts in his face. Given the duration of the contacts with his clothed genitals, Officer Plaster opined that the contact was not accidental and that the dancer intended to sexually arouse him.

Approximately 20-30 minutes later, another dancer, Dawn Michelle Callaway, also performed a table dance for the Officer Plaster. Ms. Callaway rubbed her clothed genitals against his clothed genitals three or four times, and rubbed her breasts in his face. In his opinion, her intent was to sexually arouse him.

iv. Testimony of Detective Ronald M. Catlin Regarding Events of August 13, 1998

Detective Ronald Catlin, a DPD vice detective, testified that he and Officer Plaster entered Respondent's establishment on the afternoon of August 13, 1998. They were seated at a table when a dancer, GERALYN SUE HAKERT, performed a table dance for Detective Catlin. Ms. Hakert rubbed her breasts in his face, straddled him, simulated sexual intercourse, and rubbed her breasts and face against his clothed genitals. She also backed up to him and rubbed her buttocks against his clothed genitals. In his opinion, the contact was not accidental, and was intended to sexually arouse him.

A second dancer, Stephanie Gail Seefluth, also performed a table dance for Detective Catlin, during which she rubbed her breasts, buttocks, and the top of her head against his clothed genitals. In his opinion, the contact was not accidental, and was intended to sexually arouse him.

v. Testimony of Officer David Tremain Regarding Events of April 8, 2000

Officer David Tremain, a DPD vice officer, testified that he was in Respondent's establishment on April 8, 2000, and purchased a table dance from a dancer, Julia Rosalba Alfaro. Ms. Alfaro stood on the chair, with her feet on the outside of the chair, and pushed her genitals into his face. She then slid down his body, rubbing her breasts in his face as she went. She also spread his legs, kneeled in front of him, and rubbed her forehead against his clothed genitals. In addition, she presented her buttocks to him, grinding them into his clothed genitals. In his opinion, the dancer's contact with his clothed genitals was intended to sexually arouse him.

b. Soliciting Customer to Buy Drinks for Consumption by Respondent's Employee

Detective Doyle Furr, a DPD vice detective, testified that on August 3, 1999, he was in Respondent's establishment seated at a table when a waitress, Ms. Rios, asked him if he would buy a drink for one of the dancers on stage because it was the dancer's first night and she was having a rough time. Detective Furr said he did not know what the dancer was drinking, whereupon Ms. Rios talked to the dancer and returned to Detective Furr, telling him the dancer was drinking Budweiser. Detective Furr agreed to buy the dancer a beer. The waitress returned with the beer, set it beside the stage where the dancer was performing, and collected the money for the beer from Detective Furr. The dancer drank part of the beer while dancing, and then, after the dance, seated herself at Detective Furr's table, thanked him for the beer, and finished drinking it there.

c. **Failure to Report Breach of Peace**

i. **Testimony of Officer Robert Blanco Regarding Events of June 30, 1998**

Officer Robert Blanco, DPD, testified that on June 30, 1998, he was dispatched to Respondent's establishment because a dancer, Nettie King, reported an assault. She informed Officer Blanco that she and another dancer had become involved in a physical struggle, and that the bartender had grabbed Ms. King around the neck and dragged her out of Respondent's establishment. The officer prepared an offense report based on this complaint. Respondent did not report this event to the Commission.

ii. **Testimony of Officer David Salomon Regarding Events of October 27, 1999**

Officer David Salomon, DPD, testified that on October 27, 1999, he was flagged down on Greenville Avenue and informed by a citizen witness that a fight had occurred in Respondent's parking lot. Upon investigation the officer determined that a patron of Respondent's establishment had been evicted from the establishment, was angry over his eviction, and that when the victim attempted to calm him down, the patron hit the victim in the face, breaking the victim's nose. Respondent did not report this event to the Commission.

iii. **Testimony of Officer Marissa Lynn Hawley Regarding Events of October 28, 1999**

Officer Marissa Lynn Hawley, DPD, testified that on the evening of October 28, 1999, she was informed by a complainant that the complainant, while working at Respondent's establishment, was hit in the head by glass mug thrown across the room. The injury required stitches. The person suspected of throwing the mug left his name with Respondent before leaving Respondent's establishment. Respondent did not report this event to the Commission.

d. **Respondent's Violation History**

In addition to the DPD allegations, Staff presented the record of disciplinary actions taken by Petitioner against Respondent for Respondent's past violations. Staff argued that Respondent's history of prior violations, when coupled with the present allegations, show that Respondent is either unable or unwilling to operate its premises in a manner consistent with the Code requirements. Respondent's past disciplinary actions show that on April 26, 1995, Respondent agreed to a ten-day suspension or \$1,500.00 civil penalty for employing a minor and for allowing an intoxicated employee on the premises. On March 29, 1996, Respondent agreed to a seven-day suspension or a \$1,050.00 civil penalty for permitting solicitation of drinks by an employee and for allowing an intoxicated employee on Respondent's premises. On May 8, 1998, Respondent agreed to a 45-day suspension or a \$6,750.00 civil penalty for three separate violations of failing to report a breach of the peace on Respondent's premises; four separate violations of engaging in or permitting conduct on the premises which was lewd, immoral, or offensive to public decency, to wit: engaging in acts

of sexual contact with the intent to arouse or gratify sexual desires; one violation of soliciting customers to buy drinks for Respondent's employee; and one violation of selling alcohol at a time prohibited by the Texas Alcoholic Beverage Code. And, on September 11, 1998, Respondent agreed to a two-day suspension or a \$300.00 civil penalty for failing to report a breach of the peace. The repeated nature of the violations, according to Staff, is evidence that suspensions and civil penalties have been ineffective in convincing Respondent to correct its on-going problems, and that canceling Respondent's permits is therefore the most appropriate discipline in this case.

2. Respondent's Evidence and Contentions

a. Credibility of Witnesses/Untrue Allegations

Respondent first argues that Petitioner's allegations are untrue and that its witnesses are not credible.

Respondent contends that certain leaders in the Dallas city government (hereinafter "the City") have spent years engaged in a concerted effort to force Respondent to either close down or move to a location the City deems more appropriate for Respondent's kind of business. Steven Craft, Respondent's vice president, testified that the City has long been opposed to topless entertainment in general, and to Respondent's establishment in particular, because Respondent, due to its location, is designated by the City as a nonconforming alcohol beverage establishment (Resp. Ex. RR).² The City, Respondent contends, is attempting to pressure it to move from its current nonconforming location to a location approved by the City for sexually oriented businesses. Respondent's problems with the City, according to Mr. Craft, are therefore a result of both the nature of its entertainment and the location of its establishment (Vol. III, p. 670).

Respondent argues that because the City is opposed to Respondent's business, and that because the police officers who testified at the hearing are city employees, that the police officers, are, therefore, also opposed to Respondent's business, and that their testimony, being influenced and motivated by the City's opposition, is not credible.

Shundelion Gant, a dancer at Respondent's establishment, also challenged the credibility of Petitioner's witnesses by contradicting Detective Town's description of the table dance she performed for him. She testified that she did not rub or grind her buttocks and genitals against his clothed genitals, that she did not perform a "body slide" by rubbing her body against his, and that she did not intend to sexually arouse him.

In fact, according to Ms. Gant, dancing in the manner alleged by Detective Town would have been in violation of Respondent's policies and have resulted in her being fired. She testified that Respondent has signs posted in the dressing room informing dancers that lewd dancing is prohibited,

²

The record is not clear concerning why, exactly, Respondent is designated as a nonconforming establishment; whether it is due to Respondent's proximity to a church, a school, or for some other reason.

and that the employment of dancers who violate this rule is subject to termination.

Furthermore, Ms. Gant testified that Respondent also prohibits drink solicitation on its premises. Respondent has signs posted in the dressing room informing dancers not to solicit drinks, and stating that their employment is subject to termination for violating this rule.

Massoud Asiaban, who worked as a manager at Respondent's establishment in 1998 and 1999, further testified that, during the time he was employed by Respondent, waitresses and dancers who violated the drink solicitation and lewd dancing prohibitions were subject to termination.

b. Discriminatory/Selective Enforcement

Respondent next argues that even if some of Petitioner's allegations are true, the violations were discovered as a result of improper discriminatory enforcement against Respondent. Respondent alleges that the City has subjected it to greater scrutiny than it has other topless establishments because the City wants to force Respondent to move from its present nonconforming location, either by making it relocate or by driving it out of business.

The City first attempted to force nonconforming establishments, like Respondent's, to relocate by passing ordinances that required dancers at these nonconforming establishments to wear bikini tops. However, the City's ordinances were challenged and found unconstitutional. When this effort failed, the City then, according to Mr. Craft, resorted to harassment techniques, using the police to conduct raids and investigations designed solely to intimidate the employees, disrupt the operation of its business, and to frighten away patrons.

Such tactics, however, were not used against similar establishments located in areas of Dallas deemed acceptable by the City for this kind of business. Gentlemen's clubs located in those areas were not subject to this degree of heightened scrutiny.

By using this unfair discriminatory enforcement against Respondent, the City has attempted to generate evidence of violations to give to the Commission, that can be used for disciplining Respondent. In other words, the City, according to Respondent, is now using the Commission to do what the City has tried, but failed, to do for years: make Respondent relocate or put it out of business. The Commission, Respondent argues, has now become a party to the City's discriminatory actions by using the evidence and testimony provided by the City to bring this enforcement action against Respondent.

This discriminatory enforcement, Respondent argues, violates the United States Constitution. Any suspension or revocation of Respondent's liquor permits, or, for that matter, even a monetary fine, would, according to Respondent, have a chilling effect on Respondent's ability to engage in its First and Fourteenth Amendment rights of freedom of expression. In fact, as Mr. Craft specifically testified, if Respondent loses its liquor license, it will be forced to close (Vol II, p.424-425).

c. **Scienter**

Respondent also argues that even if some of Petitioner's allegations are true, the acts that formed the basis for the complaints were performed by individuals who were neither agents nor representatives of Respondent. Respondent did not know and certainly did not consent to any illegal acts, and if such acts, in fact, occurred on Respondent's premises, they were done in direct violation of Respondent's policies. Respondent should therefore not be held accountable for the actions of its employees.

V. ANALYSIS

1. **Credibility of Witnesses/Untrue Allegations**

a. **Lewd, Immoral, or Offensive Conduct**

Respondent argued that none of the nine Dallas Police Department officers who testified at the hearing should be considered credible because they were employed by the city of Dallas. Since the city of Dallas is opposed to Respondent's business, so too, Respondent argued, were these officers. It is Respondent's contention that this opposition by the City caused these officers to fabricate the accounts of the violations, falsify police reports, file false criminal complaints, and perjure themselves at the hearing in this matter.

As fundamental and long-standing as this dispute between the City and Respondent may be, the evidence does not show that the police officers in this matter engaged in a wholesale effort to manufacture false evidence or defraud this legal proceeding. The record does not support a finding that the animus that may exist between the City and Respondent can be rightly imputed to these officers. Respondent's assertions to the contrary, the credibility of Petitioner's witnesses has not been impeached.

However, the credibility of some of Respondent's witnesses may be called into question. Ms. Gant, a dancer at Respondent's establishment, testified that she did not perform a lewd dance as described by Detective Town. However, this particular dancer is still employed by Respondent, giving her a financial interest in the outcome of this case. Any discipline effecting Respondent's permits, would, possibly, have the potential for negatively effecting her ability to earn an income.

Respondent also offered the testimony of Massoud Asiaban, a past floor manager. Mr. Asiaban, while working in his capacity as a manager, was responsible for insuring that lewd dancing did not occur on the premises. He testified that he was aware of no lewd dancing in Respondent's establishment. However, given his responsibilities as floor manager, to testify otherwise would have been admitting that he had failed to do his job properly. His testimony may, therefore, be self-serving.

Respondent's most credible witness was its vice president, Steven Craft. Although he obviously has a financial interest in the outcome of this matter, there is no reason to question his description of Respondent's on-going difficulties with the city, nor any reason to doubt that he takes

great pains in his professional capacity to insure that activities occurring on Respondent's premises are all within the appropriate laws.

However, he could not testify concerning the particular facts of this case. He did not observe the specific dances in question, and could not testify to what actually happened (Vol. III, p. 641). Although, as a matter of policy, dancers are not allowed to engage in the acts described by the officers, such dances could have occurred according to Mr. Asiaban (Vol III, p. 545), and, in fact, did occur according to Ms. Gant (Vol. III, p. 682), despite Respondent's express prohibitions and best efforts to the contrary.

Accordingly, the evidence presented by Respondent failed to rebut the testimony presented by Petitioner's witnesses concerning lewd dancing violations observed by the DPD officers. Petitioner has therefore shown, by a preponderance of the evidence, that table dances as described by the police officers occurred on Respondent's premises. These table dances constitute sexual contact,³ and are therefore lewd or vulgar entertainment or acts.

b. Soliciting Customer to Buy Drinks for Consumption by Respondent's Employee

Mr. Asiaban testified that he was the manager on duty when Respondent's waitress allegedly solicited Detective Furr to purchase a drink for a dancer. When Detective Furr informed him of this allegation, he immediately sought out the waitress in question and had Detective Furr confront her with the complaint. She denied the allegation. Mr. Asiaban further testified the waitress then resigned, either that night or the next, because she knew she was going to be fired. The dancer for whom the drink was solicited, and who likewise denied the allegation, was fired.

The factual accounts given by the waitress and dancer, as relayed by Mr. Asiaban, and the factual account given by Detective Furr, are mutually exclusive. As such, the decision in this matter turns, in large part, upon the credibility of the witnesses.

In this instance, Detective Furr testified personally, during which his demeanor and conduct were subject to assessment for credibility. The waitress and the dancer, however, did not appear at the hearing and did not testify. Although Mr. Asiaban testified concerning their reactions to the allegations, that is not particularly helpful in judging credibility. To judge the credibility of a witness, it is necessary that the witness be present. Detective Furr's credibility as a witness could be judged. Theirs, because they did not testify, could not. Detective Furr's comportment and demeanor support a finding that his testimony was credible. There is no comparable evidence in the record to support a finding that Respondent's waitress and dancer were credible.

³

See Byrum v. State, 762 S.W. 2d 685 (Tex. App. - Houston [14th Dist] 1988), where a table dancer who spread her customer's legs apart and rubbed her bare thighs and buttocks against his genitals was found to have engaged in sexual contact as defined in TEX. PENAL CODE ANN. § 21.01(2) (Vernon 2000) and as proscribed by TEX. PENAL CODE ANN. § 21.07 (Vernon 2000).

Respondent has, therefore, failed to show that Petitioner's witness was not credible, and has likewise failed to produce sufficient evidence to rebut Petitioner's allegations. Petitioner has therefore shown, by a preponderance of the evidence, that Respondent's employee solicited Detective Furr to buy a drink for consumption by an employee of Respondent. This constitutes a violation of the Code.⁴

c. Failure to Report Breach of Peace

The term "breach of the peace" is not statutorily defined. However, the Court of Criminal Appeals has approved the following definition:

The term "breach of the peace" is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm disturbs the peace and quiet of the community. By "peace," as used in this connection, is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members. Breach of the peace is a common-law offense. ...

The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet, of an invasion of the security and protection which the laws afford to every citizen, or of acts such as tend to excite violent resentment or to provoke or excite others to break the peace. Actual or threatened violence is an essential element of a breach of the peace. Either one is sufficient to constitute the offense.

Woods v. State, 152 Tex. Crim. 338, 213 S.W.2d 685,687 (Tex. Crim. App. 1948).

In other words, to be a breach of the peace the act complained of must be one which disturbs or threatens to disturb the tranquillity enjoyed by the citizens. See Head v. State, 131 Tex. Crim. 96, 96 S.W.2d 981, 983 (Tex. Crim. App. 1936); Ross v. State, 802 S.W.2d 308, 314-15 (Tex. App. Dallas 1990, no pet.); Andrade v. State, 6 S.W.3d 584 (Tex.App.-Houston[14th Dist.] 1999).

The acts that occurred on Respondent's premises that precipitated the calls for assistance from DPD, and concerning which the DPD officers testified in the instant case, constitute breaches of the peace.

There is no dispute concerning whether Respondent notified the Commission of the breaches of the peace. Mr. Craft testified that Respondent did not report the breaches of the peace because Respondent's management was not aware they had occurred (Vol. III, p. 612-613), and because he

⁴ See Bruce v. State, 743 S.W.2d 313 (Tex. App. - Houston [14th Dist] 1987) where soliciting drinks in the manner alleged herein constituted a violation of TEX ALCO. BEV. CODE ANN. § 104.01(4).

was not aware that breaches of this nature had to be reported (Vol. III, p. 615). Had he known, he would have reported them (Vol. III, p. 617).

Respondent has a statutory obligation to supervise its premises. It is responsible to both know and report breaches of the peace. To allow a permittee to avoid this obligation by claiming it was not aware of the breaches would merely encourage permittees to cultivate ignorance of such acts. This is not consistent with the legislative intent that requires permittees to know what is happening on their premises, and this statutory requirement may not be avoided by merely asserting ignorance of the acts occurring therein.

Accordingly, Petitioner has shown, by a preponderance of the evidence, that breaches of the peace occurred on Respondent's premises, and that Respondent failed to promptly report these breaches of the peace to the Commission.

2. Discriminatory/Selective Enforcement

The defense of discriminatory enforcement is based on the constitutional guarantee of equal protection under the law. U.S. Const. amend. XIV, §§ 2; Tex. Const. art. I, §§ 3; see generally Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Though the defense originated in the context of criminal prosecutions, the governing principles also apply to civil proceedings involving state agencies. See Railroad Commission v. Shell Oil Co., 139 Tex. 66, 71-76, 161 S.W.2d 1022, 1025-28 (1942); Colorado River W. Ry. v. Texas & New Orleans R.R. Co., 283 S.W.2d 768, 776-77 (Tex.Civ.App. - Austin 1955, writ ref'd n.r.e.)

To establish a claim of discriminatory enforcement, Respondent must first show that it has been singled out for prosecution while others similarly situated and committing the same acts have not. See United States v. Rice, 659 F.2d 524, 526 (5th Cir.1981); Wolf v. State, 661 S.W.2d 765, 766 (Tex.App.--Fort Worth 1983, writ ref'd n.r.e.). It is not sufficient, however, to show that the law has been enforced against some and not others. Respondent must also show that the government has purposefully discriminated on the basis of such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. See Rice, 659 F.2d at 526; Wolf, 661 S.W.2d at 766; see also Super-X Drugs of Texas, Inc. v. State, 505 S.W.2d 333, 336 (Tex.Civ.App.--Houston [14th Dist.] 1974, no writ).

The complexity of regulatory enforcement requires that a state agency retain broad discretion in carrying out its statutory functions. See Heckler v. Chaney, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985). Thus, a discriminatory purpose is never presumed; rather, the party asserting the defense of discriminatory enforcement must show a clear intentional discrimination in enforcement of the statute. See S.S. Kresge Co. v. State, 546 S.W.2d 928, 930 (Tex.Civ.App.--Dallas 1977, writ ref'd n.r.e.).

The burden is on Respondent in the instant case to show that the Commission has clearly and intentionally discriminated against Respondent by singling Respondent out for disciplinary action while not pursuing others similarly situated and committing the same acts. This would, at the very least, require a showing that (1) other establishments were committing the same acts and (2) that the

Commission was not investigating those other establishments.

The evidence, however, is to the contrary. Mr. Craft testified that he had rarely been inside any other gentlemen's clubs in Dallas County during the last four years and had not personally seen any lewd dancing in any other topless gentlemen's club during this four year period (Vol. III, p. 664). This does not support the contention that other establishments were committing the same acts (such as lewd dancing) as Respondent. On the contrary, it shows, first, that Respondent does not know whether other establishments were committing the same infractions, since Mr. Craft had rarely been inside any other establishments in years, and, second, that on those occasions when he was present, he saw no violations. This supports the contention that any apparent difference in enforcement between Respondent and other establishments (if, in fact, there was a difference) was most likely caused by violations occurring in Respondent's establishment (such as lewd dancing) that were not occurring in other establishments.

Furthermore, Mr. Craft also testified that he was aware of undercover operations conducted by the Commission and/or DPD which targeted gentlemen's clubs, and which, in fact, found violations in at least three of those locations.⁵ This testimony does not support the contention that the City was singling out Respondent, or that it was ignoring other establishments. On the contrary, this testimony supports the contention that investigations were being carried out by DPD in many establishments, even the gentlemen's clubs that Respondent argued were being subjected to lower scrutiny, and that violations in those establishments were being reported.

In addition, Mr. Craft testified that Respondent was not the subject of as much political opposition as other locations,⁶ and that the focus of the City's enforcement attention during this time

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It is unclear from his testimony whether Mr. Craft was referring to TABC undercover agents or DPD undercover agents. He specifically states that TABC agents conducted the investigations and found violations (Vol. II, p. 412, lines 7-16), but then states that the violations were found in establishments that TABC agents had just investigated the week before, in which no violations had been found, and that the violations were instead discovered by DPD agents (Vol. II, p. 412, lines 20-24). However, for purposes of this decision, it does not matter whether the violations were found by TABC or DPD, since, in this case, TABC is relying upon investigations conducted by DPD.

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Mr. Craft testified as follows (Vol II, p.428-430):

- Q. Now, The Fare hasn't been the subject of as much, again, political heat as some of the other locations?
- A. No, sir. We probably created that ourself.
- Q. And what do you mean by you created that heat yourself?
- A. Well, the original target was the Bachman Lake/Northwest Highway area, and we ...brought that up in court to the ...Judge, they're targeting this one area. And I've never accused the City of Dallas

was directed primarily towards establishments in the Bachman Lake area, not Respondent's area.⁷

In 1997, according to Respondent, the City was focusing its regulatory attention on the Bachman Lake/Northwest Highway area. This is not where Respondent is located. To the extent that Respondent subsequently attracted the City's attention, it was due to the City widening its regulatory scope to include other parts of Dallas. This does not support Respondent's contention that it was singled out and treated differently than other establishments. On the contrary, the evidence shows that Respondent's location was not originally a target at all, and that violations found by DPD at Respondent's location, including the lewd dancing violations in 1998, were discovered during a time when Respondent's establishment was just one of many locations being investigated by the City.

as being stupid. They're smart. They're intelligent. They – they spread that out. They went all over the city after we made that challenge, so that's what I mean we probably created it.

Q. Now, ... that led to the, Hey, well, they're still not going after the Men's Clubs and The Lodges and the Cabarets of the world. Did they do something about that too recently here?

A. Sure. Then they started going after The Lodge. They started going after Dallas Gentlemen's Club.... But more specifically, they went after Cabaret Royale.

Q. ...looking at some records is January of '97 ... the first time that the liquor task force of the Dallas Police Department visited Cabaret Royale...?

A. Yes.

⁷Mr. Craft's testimony is as follows (Vol II, p.383):

Q. Now, let's go back in time to 1997

Q. What was – the people who wanted you closed, the moral groups and things, were they happy or upset at that time?

A. They were upset.

Q. What part of town drew the primary focus? Was it Greenville Avenue where the Fare is located?

A. No, sir. It was the Bachman Lake/Northwest Highway area.

Q. Okay. So the Fare wasn't really the focus of the ire of the groups at that time?

A. No. It was definitely not the focal point.

3. **Scienter**

Respondent finally argues that it should not be held accountable for actions committed by its employees because Respondent's management did not know about or condone any illegal actions, and, in fact, that such actions were in direct violation of Respondent's policies and procedures.

However, it is not necessary for Respondent to be aware of violations to nonetheless be held liable for them.

Two of the relevant statutory provisions (TEX ALCO. BEV. CODE ANN. § 104.01(4) and (6) (Vernon 2000)) do not require a showing of actual knowledge by Respondent; just a showing that Respondent "permitted" the proscribed behavior on its premises.⁸

The controlling case defining "permitted" in alcohol licensing matters is Wishnow v. Texas Alcoholic Beverage Commission, 757 S.W.2d 404 (Tex.App. - Houston [14th Dist.] 1988, writ denied). In that case, the appellant argued that he could not see and did not know that the prohibited conduct was occurring and therefore could not be held to have "permitted" it.

The court, however, stated that the proper test for determining whether a permittee "permitted" certain conduct is not his actual observation or knowledge of the violations but rather whether he "knew or should have known" of the violations.

In the instant case, if Respondent did not actually know about the employees' actions, it certainly should have known. The testimony emphasized the strict control Respondent exerted over the establishment and operation of the business. Managers, who carry two-way radios, work at the front door and on the floor to monitor what is going on; the disc jockey is responsible for observing what is happening on the floor; wait staff and dancers have a responsibility to not only monitor the actions of the patrons, but to monitor the actions of each other; and an employee may be fired, not only for committing improper acts, but for failing to report improper acts committed by fellow employees. In addition, the main floor of Respondent's establishment is open and observable: there are no hidden areas outside the view of management. The table dances and drink solicitation, therefore, occurred in areas visible to Respondent's staff and management.

In addition, since the stated purpose of Respondent's establishment is sexually oriented, Respondent is charged with notice of the potential for the type of sexual activity reported by the DPD officers. Any assertion by Respondent that its management did not see the actual acts complained of is, therefore, "no defense at all." See Wishnow, at 409-410.

As such, the evidence shows that Respondent knew or should have known that table dancing occurring on its premises was in violation of the Code, that Respondent therefore permitted the

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Pursuant to TEX ALCO. BEV. CODE ANN. § 104.01(4) and (6) (Vernon 2000), it is a violation to "permit" conduct such as "solicitation of any person to buy drinks for consumption by the retailer or any of his employees" or "lewd or vulgar entertainment or acts."

improper table dancing to be performed on its premises, that Respondent knew or should have known its employee solicited a patron to purchase a drink to be consumed by another employee, that Respondent therefore permitted its employee to solicit a patron to purchase a drink for consumption by an employee, and that Respondent failed to report breaches of the peace to the Commission that occurred on Respondent's premises.

VI. RECOMMENDATION

Based on Respondent's history of past violations, the number of violations that were proven by a preponderance of the evidence, and the fact that despite being disciplined for similar violations in the past the same violations continue to occur, it is the ALJ's recommendation that Respondent's permits be canceled.

VII. FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.
2. Respondent, Allen-Burch Inc., d/b/a The Fare, 5030 Greenville Avenue, Dallas, Texas, holds Mixed Beverage Permit, MB-234661 and mixed Beverage Late Hours Permit, LB-234662.

LEWD DANCING

3. On July 16, 1998, Brandy Louise Besio was employed as a dancer in Respondent's establishment.
 - a. She performed a table dance for Detective Daniel Town, Dallas Police Department, in which she pulled Detective Town's head into her breasts; straddled his leg; ground her clothed genitals and buttocks against his clothed genitals several times in a manner simulating sexual intercourse; and slid her body down between his legs, rubbing the top of her head and her left knee against his clothed genitals.
 - b. Her actions were done with the intent to arouse or gratify the Detective's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Her conduct was observable by Respondent's management.
4. On July 16, 1998, Shudelon Denise Gant was employed as a dancer in Respondent's establishment.
 - a. She performed a table dance for Detective Town in which she pulled Detective Town's head into her breasts; performed rearward and forward thrusting motions of

her clothed buttocks and genitals against his clothed genitals making contact with his clothed genitals; slid her body down his; and, while on her knees between his legs, rubbed her chest and stomach against his clothed genitals.

- b. Her actions were done with the intent to arouse or gratify the Detective's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Her conduct was observable by Respondent's management.
5. On July 16, 1998, Nicole Susan Cheek was employed as a dancer in Respondent's establishment.
- a. She performed a table dance for Detective Prokoff, Dallas Police Department, in which she rubbed her buttocks against his clothed genitals simulating sexual intercourse, and rubbed her knees and shin against his clothed genitals.
 - b. Her actions were done with the intent to arouse or gratify the Detective's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Her conduct was observable by Respondent's management.
6. On July 16, 1998, Lynn Elizabeth Howell was employed as a dancer in Respondent's establishment.
- a. She performed a table dance for Detective Prokoff in which she rubbed her buttocks, knees, shin, ankle, and vaginal area against his clothed genitals.
 - b. Her actions were done with the intent to arouse or gratify the Detective's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Her conduct was observable by Respondent's management.
7. On August 13, 1998, Dawn M. Schwalen was employed as a dancer in Respondent's establishment.
- a. She performed a table dance for Detective Frank Plaster, Dallas Police Department,

- in which she ground her clothed genitals against his clothed genitals three or four times, and rubbed her breasts in his face.
- b. Her actions were done with the intent to arouse or gratify the Detective's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Her conduct was observable by Respondent's management.
8. On August 13, 1998, Dawn Michelle Callaway, was employed as a dancer in Respondent's establishment.
- a. She performed a table dance for Detective Plaster in which she rubbed her clothed genitals against his clothed genitals three or four times, and rubbed her breasts in his face.
 - b. Her actions were done with the intent to arouse or gratify the Detective's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Her conduct was observable by Respondent's management.
9. On August 13, 1998, GERALYN SUE HAKERT, was employed as a dancer in Respondent's establishment.
- a. She performed a table dance for Detective Ronald Catlin, Dallas Police Department in which she rubbed her breasts in his face; backed up to him and rubbed her buttocks against his clothed genitals; and rubbed her breasts and face against his clothed genitals.
 - b. Her actions were done with the intent to arouse or gratify the Detective's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Respondent's management could have observed her conduct.
10. On August 13, 1998, Stephanie Gail Seefluth was employed as a dancer in Respondent's establishment.

- a. She performed a table dance for Detective Catlin, Dallas Police Department, during which she rubbed her breasts, buttocks, and the top of her head against his clothed genitals.
 - b. Her actions were done with the intent to arouse or gratify the Detective's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Her conduct was observable by Respondent's management.
11. On April 8, 2000, Julia Rosalba Alfaro was employed as a dancer in Respondent's establishment.
- a. She performed a table dance for Officer David Tremain, Dallas Police Department, in which she presented her buttocks to him, grinding them into his clothed genitals; stood on his chair, with her feet on the outside of the chair, and pushed her genitals into his face; slid down his body, rubbing her breasts in his face as she went; and spread his legs, kneeled in front of him, and rubbed her forehead against his clothed genitals.
 - b. Her actions were done with the intent to arouse or gratify the officer's sexual desire.
 - c. Her conduct occurred in a public place where others could see and be offended by the conduct.
 - d. Her conduct was observable by Respondent's management.

DRINK SOLICITATION

12. On August 3, 1999, Ms. Rios was employed as a waitress in Respondent's establishment.
13. Ms. Rios asked Detective Doyle Furr, a Dallas Police Department vice detective, to buy a drink for one of the dancers. Detective Furr agreed, whereupon Ms Rios delivered a beer to the dancer and collected the money for the beer from Detective Furr.

BREACH OF THE PEACE

14. On June 30, 1998, Nettie King fought with another dancer, and was grabbed around the neck by a bartender and dragged out of Respondent's establishment. She reported the assault to Officer Robert Blanco, Dallas Police Department. Respondent did not report this event to the Commission.
15. On October 27, 1999, a patron of Respondent's establishment was evicted from

- Respondent's establishment. While still in Respondent's parking lot, the patron struck a second person in the face, breaking that person's nose. Respondent did not report this event to the Commission.
16. On October 28, 1999, an employee of Respondent was hit in the head by glass mug thrown across the room in Respondent's establishment. The victim informed Officer Marissa Lynn Hawley, Dallas Police Department. The person suspected of throwing the mug left his name with Respondent before leaving Respondent's establishment. Respondent did not report this event to the Commission.
 17. Petitioner instituted disciplinary action against Respondent alleging that Respondent or its employees, agents, or servants, engaged in or permitted conduct on Respondent's premises that was lewd, immoral, or offensive to public decency; that Respondent failed to notify Petitioner of breaches of the peace on Respondent's premises; and that Respondent or its employees, agents, or servants, engaged in soliciting a customer to buy drinks for consumption by one of Respondent's employees.
 18. The hearing in this matter was held on October 16-18, 2000, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Texas Alcoholic Beverage Commission Staff was represented by its attorneys, Dewey Brackin and Timothy Griffith. Respondent was represented by Charles Quaid and Eugene Palmer, attorneys. The record remained open for receipt of the parties proposed findings of fact and conclusions of law. The record was closed on January 5, 2001.

VIII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Subchapter B of ch. 5, §§ 6.01 and 11.61. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021 (Vernon 2000).
2. Based on Findings of Fact Nos. 3-11, Respondent permitted conduct on its premises that was lewd, immoral, or offensive to public decency. TEX ALCO. BEV. CODE ANN. § 104.01(6) (Vernon 2000).
3. Based on Findings of Fact Nos. 12-13, Respondent permitted on its premises solicitation by Respondent's employee of a person to purchase drinks for consumption by Respondent's employee. TEX ALCO. BEV. CODE ANN. § 104.01(4) (Vernon 2000).
4. Based on Findings of Fact Nos. 14-16, Respondent failed to promptly report to the Commission breaches of the peace occurring on the permittee's licensed premises. TEX ALCO. BEV. CODE ANN. § 11.61(b)(21) (Vernon 2000).
5. Based on the foregoing Findings and Conclusions, Respondent's permits should be canceled

by the Commission.

Signed this 4 day of June, 2001.



JERRY VAN HAMME
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS